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NO. 571125-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ARMEN YOUSOUFIAN,

Appellant,

v.

THE OFFICE OF RON SIMS, KING COUNTY EXECUTIVE, a subdivision of KING COUNTY, a municipal corporation; THE KING COUNTY DEPARTMENT OF FINANCE, a subdivision of KING COUNTY, a municipal corporation; and THE KING COUNTY DEPARTMENT OF STADIUM ADMINISTRATION, a subdivision of KING COUNTY, a municipal corporation,

Respondents.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Armen Yousoufian appeals the trial court's discretionary ruling setting the penalty amount for King County's negligent delay in responding to a records request under the Public Disclosure Act. King County asks this Court to affirm the trial court's decision. Yousoufian falls far short of showing an abuse of discretion in this case. In any event, his appeal is not timely.

II. ASSIGNMENTS OF ERROR

King County does not assign error to the trial court's Decision on Remand, entered August 23, 2005.

III. ISSUES ON REVIEW

A. Under the penalty provision of the Public Disclosure Act, the trial court must impose a penalty for an agency's delay in responding to a public record request. The amount of the penalty is discretionary, and can only be overturned for an abuse of discretion. Did the trial court abuse its discretion in imposing a $123,000.00 penalty in this case, where:

1. the penalty is the largest in the history of the public disclosure act, and is nearly 5-times larger than the penalty originally imposed by the trial court in 2001;

2. The principal factor in setting the penalty is the presence or absence of an agency's bad faith, and it is undisputed that King County did not act in bad faith;

3. There is no evidence of economic loss to appellant, or tangible harm to the public, and the penalty is sufficient to deter similar inappropriate conduct?

B. A party seeking review of a trial court's decision must file a notice of appeal within 30 days of the entry of that decision. Yousoufian did not file a notice of appeal from the trial court's Order on Remand until 58 days after its entry. Is Yousoufian's appeal timely?

IV. STATEMENT OF THE CASE

The issue in this case is whether the trial court abused its discretion in setting the per-day penalty under RCW 42.17.340(4) due to King County's delay in providing public records. The facts are set forth in the decision of the trial court (CP 29-59), as well as the subsequent published decisions of this court[1] and the state Supreme Court[2]. What follows is in large part a summary of those facts.

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[1] *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 60 P.3d 667 (2003), *rev'd in part,* 152 Wn.2d 421 (2004).

[2] *Yousoufian v. Office of Rons Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004).

1. King County delays responding to Yousoufian's public records request.

On May 30, 1997, Armen Yousoufian sent a records disclosure request to King County Executive Ron Sims. He sought records (1) describing how a fast food tax to finance stadium construction would benefit consumers, and (2) related to the "Conway Study", which dealt with the economic impacts of sports stadiums. King County responded by letter dated June 4, 1997, informing Yousoufian that the Conway Study was available for review, but that it would take several weeks to discover if there were other items within his request.

Over the next several months, King County produced a number of documents to Yousoufian. He did not feel the information was complete, however, and he retained an attorney in December 1997. On December 8, 1997, the attorney wrote King County a letter restating Yousoufian's records request of May 30, 1997, and requesting additional information about certain studies and the cost of the studies.

The parties corresponded over the next 6 months. Then, on June 22, 1998, King County informed Yousoufian that the King County Finance Department had no documents related to the financing of stadium studies. As it was later discovered, this representation was not correct. CP 40.

2. Yousoufian files suit under PDA.

Yousoufian filed this lawsuit on March 30, 2000. *See Yousoufian v. Office of Ron Sims,* 114 Wn. App. 836, 845. As the case progressed, King County produced more documents, some of which related to the stadium studies. The case went to trial in the Summer of 2001.

3. Trial court rules that King County's negligent delay in producing records violated the Act

Following a bench trial, the court entered findings and conclusions. CP 29-59. The court found that Yousoufian had made two public records requests – one on May 30, 1997 and one on December 8, 1997. CP 68-69. While the county eventually produced all records sought, its delay in doing so violated the Public Disclosure Act. King County acted negligently, and this negligence evidenced a lack of good faith:

> In summary, the County was negligent in the way it responded to Mr. Yousoufian's PDA request at every step of the way, and this negligence amounted to a lack of good faith. [CP 46].

But the court could not find "bad faith" in the sense of intentional nondisclosure. CP 45-46.

4. The trial court groups documents, deducts penalty days, and imposes a $5 daily penalty for a total penalty of $25,450.

The court then determined the amount of the penalty under RCW 42.17.340(4). Yousoufian claimed his 2 requests covered approximately

189,000 pages of material, and that the statutory penalty amount (anywhere between $5 and $100 per day) should be applied to each page.[3] He requested fines in the range of $1.5 million to $3.6 million, an amount the trial court viewed as "ludicrous." CP 53.

Instead, the court found that Yousoufian's request covered 18 responsive documents. It divided these documents into 10 groups, based on the date of production and the subject matter involved. CP 58-59. For each group, the court determined the "days late" as the difference between the date the records were due and the date King County produced the records. King County produced 6 of these record groups after Yousoufian's March 30, 2000 lawsuit. For these groups, the court deducted 527 days from the penalty period, reasoning that Yousoufian waited an unreasonable period of time to file suit following King County's final correspondence of June 22, 1998.[4]

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[3]In the prior appeal, Yousoufian claimed the minimum penalty was $948,465. *Yousoufian*, 114 Wn. App. at 848. Dividing this figure by the $5 per day minimum statutory amount under RCW 42.17.340(4) results in approximately 189,000 pages.

[4]CP 57-59. A total of 647 days transpired between King County's June 22, 1998 letter and the date Yousoufian filed suit. The trial court reasoned that 120 days was a reasonable amount of time following King County's letter for Yousoufian to act. It arrived at the 527 day total by deducting the 120 days from the 647 day amount.

As shown in the penalty calculation table[5], the trial court determined that there were 5090 penalty days. The court assessed a $5 per day penalty (*see* RCW 42.17.340(4)), resulting in a penalty of $25,450.00. CP 59. The court also awarded Yousoufian attorney's fees in the amount of $82,196.16. CP 54. The total penalty, fees and costs equaled $114,416.26. CP 67.

The trial court explained that the minimum daily penalty -- when combined with the total attorney fees awarded -- was sufficient to deter future inappropriate conduct:

> In deciding whether to award penalties over the minimum allowable amount, the Court looked at the reasons

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[5]This table is a combination of the two tables from the trial court's findings. CP 58-59.

PENALTY CALCULATION TABLE

	Document Number	Date requested	Date due	Date received	Penalty period (deduct)
1.	1&2	5/30/97	6/6/97	6/10/97	4
2.	3	5/30/97	6/6/97	7/25/97	49
3.	4, 5, 6	5/30/97	6/6/97	8/21/97	76
4.	7	5/30/97	6/6/97	10/10/97	126
5.	8	5/30/97	6/6/97	3/7/01	843*
6.	9, 10, 11	12/8/97	12/15/97	3/7/01	651*
7.	12, 13, 14	5/30/97	6/6/97	3/19/01	855*
8.	15, 16	12/8/97	12/15/97	3/19/01	663*
9.	17	5/30/97	6/6/97	4/20/01	887*
10.	18	5/30/97	6/6/97	6/8/01	936*
	TOTALS				5090
					*indicates figure reduced by 527 days.

For rows 5 through 10, the penalty period has been reduced by 527 days. Taking row 5 as an example, the actual penalty period is 1370 days. The adjusted period of 843 is arrived at by subtracting 527 from 1370.

> for King County's failure to timely respond to Mr. Yousoufian's request. The Court also considered whether the amount would encourage King County to respond in a diligent manner to future PDA requests. [CP 55].
>
> A rate of $5 a day is selected because the Court finds that the combined total of penalty and attorney fees is sufficient to deter future similar inappropriate conduct. The penalties are not assessed on a per document basis, as requested by plaintiff, as this results in a penalty totally out of proportion to the County's negligence, the harm done thereby, and any amount needed for deterrence. [CP 55].

The court declined to impose the minimal fine suggested by King County, finding that "the government incompetence displayed in this case is not justifiable . . . ". CP 55. The court agreed, however, that there was no evidence an earlier disclosure of documents in this case "would have had any material impact on issues of public concern." CP 55.

5. Court of Appeals rules that minimum $5 per day penalty insufficient.

Yousoufian appealed. This court issued a published decision in January 2003, affirming the trial court on every issue except the daily penalty amount. Although the trial court was entitled to great deference on the penalty question, this court ruled that a minimum daily penalty could not be sustained given King County's conduct, which the court characterized as

grossly negligent.[6] *Yousoufian*, 114 Wn. App. at 853-54.

Further, the trial court justified the minimum daily penalty award by reasoning that, given the large amount of attorney fees awarded, the combined amount of fees and penalties ($114,416.16.00) would have a sufficient deterrent effect. In adopting this approach, the trial court abused its discretion. "[T]he size of an attorney fee award is not a tenable basis to award a minimum penalty where a higher penalty would otherwise be appropriate." *Yousoufian*, 114 Wn. App. at 854.

6. State Supreme Court rules that documents can be grouped and that all penalty days must be counted.

Yousoufian petitioned the state Supreme Court for review. The Court granted his petition, agreeing to decide two primary issues: (1) can records be grouped for penalty purposes (or must the per-day penalty be applied to each separate record that is delayed); and (2) did the trial court err in deducting 527 days from the penalty period for the 6 record groups.

The court ruled that records may be grouped for penalty purposes, but that days could not be deducted from the penalty period for alleged delays in bringing suit. *See Yousoufian*, 152 Wn.2d 421, 439-440. The court

[6]It is not clear whether the Court of Appeals made an independent finding of gross negligence or merely characterized the trial court's findings in that manner. The trial court's findings clearly show a string of negligent acts by various county employees over an extended period of time, but it did not use the term "gross negligence" in describing King County's conduct. *See* CP 29-59.

remanded the case to the trial court to decide the appropriate per day penalty amount and the amount of reasonable attorney's fees.

7. Trial court on remand imposes largest penalty in history of PDA.

On remand, Yousoufian and King County filed briefs with the trial court regarding (1) the proper per-day penalty, and (2) reasonable attorney fees on appeal. CP 1; 97. The court heard oral argument on August 19, 2005, and issued its Order on Remand on August 23, 2005. CP 123.

The court increased the penalty to $123,780, and awarded Yousoufian's three attorneys $171,100.35 for their services on appeal. CP 127-128. It arrived at the penalty figure by adding 3,162 days to the original penalty period (5,090) for a total of 8,252 penalty days. CP 125. The court multiplied this amount by a $15 per day penalty to reach $123,780.

On September 22, 2005, the court awarded Yousoufian's attorneys $45,970 in attorney fees on remand. *See* CP 129-130.

The $123,780 penalty is nearly 5 times larger than the amount imposed by the trial court in 2001. It has been called the largest penalty award in the history of the Public Disclosure Act.[7] When combined with nearly $300,000 in court awarded attorney fees, King County has now paid

[7] *See* The Seattle Times, August 27, 2005, page B-1; Seattle Post Intelligencer, August 27, 2005, page B-2.

Mr. Yousoufian about $423,000 for its delay in producing the requested records.

V. ARGUMENT

1. The Standard of Review is abuse of discretion

The trial court has broad discretion to determine the appropriate penalties to impose for violations of the PDA, and appellate courts will not reverse the penalty award unless the trial court abuses its discretion. *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 853, 60 P.3d 667 (2003), *rev'd in part on other grounds*, 152 Wn.2d 421 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or lacks a tenable basis. *Yousoufian*, 114 Wn. App. at 853, citing *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. The principal factor in determining the penalty amount under RCW 42.17.340(4) is the presence or absence of an agency's bad faith.

Under the Public Disclosure Act (PDA), all state and local agencies must disclose any requested public record, unless the record falls within a specific exemption. *Yousoufian,* 152 Wn.2d 421; *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 250, 884 P.2d 592 (1994). The PDA includes a penalty provision that is intended to discourage improper denial of access to public records and encourage adherence to the

goals and procedures dictated by the statute. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978).

The PDA's penalty provision allows a prevailing party to recover attorney fees, costs and penalties where an agency improperly denies access to records:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorneys fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record. [RCW 42.17.340(4)].

Where an agency violates the PDA, the trial court must impose a penalty under this provision. *King County v. Sheehan*, 114 Wn. App. 325, 355, 57 P.3d 307 (2002). But the trial court has the discretion to set the amount of the penalty anywhere between $5.00 and $100.00 per day. *See* RCW 42.17.340(4).

In determining the amount of the penalty to be imposed, the existence or absence of an agency's bad faith is the principal factor which the trial court must consider. *Yousoufian v. Sims*, 152 Wn.2d 421, 435-36; *ACLU of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 113-114; 975 P.2d 536 (1999). A requester's economic loss may also be a factor.

See Amren v. City Kalama, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997); *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992) (economic loss a factor, but attorney's fees not covered under the Act do not qualify).

3. The trial court properly balanced the relevant factors in arriving at a just penalty in this case, including the fact that King County acted with negligence rather than bad faith.

Under RCW 42.17.340(4), the total penalty is determined by multiplying the number of penalty days times the amount of the per day penalty. Adjustments to either multiple can significantly impact the size of the total penalty award.

Yousoufian's two requests covered a huge number of documents. At one point, he claimed there were 189,000 pages of material. *See Yousoufian v. Sims,* 114 Wn. App. at 848, note 2. The original trial court identified 18 separate studies, which it placed into 10 groups.

The court's decision to group these documents substantially increased the number of penalty days under RCW 42.17.340(4). The penalty could have been determined by the number of days Yousoufian's *two requests*

were unanswered.[8] *See Yousoufian*, 114 Wn. App. at 849. *See also Yousoufian,* 152 Wn.2d 421, 440 (Fairhurst, J. Concurring). Instead, the original trial court effectively created 10 requests from the original two, determined the number of days each of the 10 requests was late, added them all together, and multiplied the total by the minimum daily penalty of $5.

The adjusted penalty days total 8,252. This is the equivalent of a single penalty period over 22 years in length. King County actually produced all documents Yousoufian requested in less than 4 years.

Faced with an enormous penalty period, an agency that acted negligently but not in bad faith, a requester that suffered no economic loss, and no evidence of tangible harm to the public, it was entirely reasonable for the trial court to impose a per day penalty at the lower end of the scale. Its decision was consistent with past decisions of this court and was a proper exercise of discretion.

In setting the per day penalty at $15, the trial court on remand relied on this court's decision in *ACLU v. Blaine School District*, 95 Wn.App. 106, 975 P.2d 536 (1999). The facts of *ACLU* share a number of similarities with

[8]Had the trial court calculated the number of penalty days based on Yousoufian's 2 requests of May 30, 1997 and December 8, 1997, the maximum number of penalty days would have been approximately 2,737. This is the sum of the number of days between May 30, 1997 and June 8, 2001 (approximately 4 years times 365 days = 1,460) and the number of days between December 8, 1997 and June 8, 2001 (approximately 3.5 years times 365 days = 1,277).

this case.

In *ACLU*, the court found a $10.00 per-day penalty appropriate where a school district failed to act in good faith when responding to a public records request. The district refused to mail the ACLU a copy of its disciplinary policy, even though the ACLU offered to pay the costs. Instead, the district offered to make the records – totaling 13 pages – available for inspection at its offices. The ACLU, however, was unable to send a representative to Blaine for an on-site inspection. *ACLU*, 95 Wn. App. at 109.

The case went to the Court of Appeals twice. The first time, the court ruled that the district was required to mail the policy to the ACLU, and remanded for a determination of the penalty. *ACLU,* 95 Wn. App. at 109-110.

After the trial court imposed a $5 per day penalty on remand, the ACLU appealed again. The Court of Appeals reversed, finding that the minimum daily penalty was inappropriate because the district had not acted in good faith.

As evidence of improper motive, the court relied on letters the district wrote to parents explaining its conduct, falsely representing that the ACLU's request involved thousands of pages of documents, and that significant employee time would be needed to locate the documents. The

district had also said that it was reluctant to spend taxpayer money to assist the ACLU in preparing a case against it. *ACLU*, 95 Wn. App. at 114.

The minimum penalty, the court observed, was generally reserved for situations where an agency's refusal to disclose records was motivated by a desire to protect the rights of a third party. This concern was not what motivated the school district. Because the district did not act in good faith, a per day penalty of $10 was appropriate. The court noted this amount "was in accord with prior case law,...". *ACLU*, 95 Wn. App. at 115.

There was a lack of good faith in *ACLU* due to the district's deliberate misconduct – or at least intransigence – involving a small record request. The lack of good faith in this case, on the other hand, was due to negligent handling by county employees of a much larger, more complicated request.

This case has some similarities to the *ACLU* fact pattern, including misrepresentations by the government agency.[9] The County's factual and legal misrepresentations were due to negligence, however, whereas the district's misrepresentations in *ACLU* were intentional. *See Yousoufian v.*

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[9]On several occasions, King County mistakenly represented to Mr. Yousoufian that it had fully responded to his requests, when in fact it had not. CP 37, 39-40. The trial court also found that, in early 1998, King County represented to Yousoufian that "hundreds of hours" had been spent trying to retrieve responsive documents." CP 39. The court found this statement to be "factually and legally incorrect." CP 39. While there may have been some exaggeration in the time estimate, it is clear that by January 1998, King County had devoted a considerable amount of time to Mr. Yousoufian's public record request. The trial court's description of King County's activities from June 1997 through January 1998, *see* CP 31-39, is eight pages in length.

Office of Ron Sims, 114 Wn. App. 836, 853. Despite extensive discovery by Yousoufian, he uncovered no "evil intent" (CP 52), and there was "no intentional nondisclosure or intent to conceal." CP 47. King County's negligence is lesser in degree than the district's conduct in *ACLU.*

The argument can be made that the penalty amount should reflect the significance of the project the records request was related to, as well as the imminence of the election concerning these projects.[10] The courts have not recognized these factors as a basis to increase penalty amounts in past PDA cases, and the facts of this case do not justify such an approach.

The per-day penalty should not depend on the size of a records request, because this typically has no correlation to an agency's good or bad faith in responding. *See Yousoufian*, 152 Wn.2d at 436 (rejecting argument that penalty should be based on size of plaintiff's request). Delays in producing a large request may lead to a larger total penalty, however, if the court groups documents as it did in this case.

Similarly, the per-day penalty should not be raised simply because a citizen requests records just prior to an election on a matter of public interest. By itself, the timing of a request says nothing about an agency's good or bad

[10]*See Yousoufian*, 152 Wn.2d 421, 444, 98 P.3d 463 ("the amount at issue in the special election concerning Seahawks Stadium (now Qwest Field) was $300 million. A just penalty must reflect these realities." (Sanders, J., dissenting).

faith. The focus should remain on the actions of the agency in responding, not on when a citizen makes the request or how large it is.

Even assuming King County could have produced all records sought before the June 17,1997 election, there is no evidence that its failure to do so materially impacted issues of public concern. CP 55. Yousoufian has never shown that King County misled the public concerning the impact of the stadiums prior to the election. Aside from innuendo, there is no tangible evidence of harm to the public due to King County's negligent delay in producing the records requested. Further, there is no evidence of economic harm to Yousoufian.

Given all these factors, the trial court justifiably imposed a penalty of $15 per day, for 8,252 penalty days, for a total of $123,780. Exercising their discretion, two superior court judges have now concluded that this amount is sufficient to deter similar acts of misconduct in the future.[11]

4. The massive penalty sought by Yousoufian is totally out of proportion to King County's negligence, the harm caused thereby, and any amount necessary for deterrence (CP 55).

Yousoufian claims the trial court's abused its discretion in determining the penalty in this case. First, he believes the court failed to

[11]In the first trial, Judge Learned stated that "the combined total of penalty and attorney fees is sufficient to deter future similar inappropriate conduct....". CP 55. That combined total was $114,416.26, *see Yousoufian v. Sims*, 114 Wn. App. at 846, and it is in line with what the trial court on remand imposed.

consider the entire penalty range of $5 to $100 in setting the penalty. Second, he claims the amount awarded was insufficient to deter future misconduct. Third, he contends this court's reasoning in *ACLU v. Blaine School District* is inappropriate for this case. Finally, he argues that the penalty imposed undermines the "enforcement mechanism" of the PDA and ignores the mandate for liberal construction of the Act.

By itself, a trial court's use of the "entire penalty range" is not a useful indicator of whether discretion has been abused. A simple example illustrates this point.

Assume an agency mishandles a citizen's public record request, and, as a result, it is 10 days late in producing the 100 records covered by the request. Two different trial courts determine the penalty:

- Trial court "A" imposes a penalty of $1000, arrived at by the following calculation:

(1 request) x (10 days late) x ($100 per day penalty) = $1,000.

- Trial court "B" also imposes a $1000 penalty, but it breaks the 100 records into 10 groups and determines the penalty as follows:

(10 record groups) x (10 days late) x ($10 per day penalty) = $1,000.

Under Yousoufian's reasoning, Trial Court B has abused its discretion for failing to use the full penalty scale, but Trial Court A's result is sound. This outcome doesn't make much sense, and it underscores the

fallacy of looking only to the per-day penalty when evaluating whether the total penalty imposed is appropriate.

Without considering this crucial relationship between penalty days and per-day penalty amount, Yousoufian asks the court to adopt a six-level culpability scale to determine the penalty amount under RCW 42.17.340(4). *See* Brief of Appellant, at 12. Though creative, this proposal is unnecessary and unworkable.

In drafting RCW 42.17.340(4), the legislature found no need to limit trial court discretion through an elaborate category system. Such fine distinctions would prolong litigation as parties struggle to place violations in artificial categories loaded with vague criteria.

For example, there appears to be little - if any - legal distinction between "innocent mistakes" (Category 1) and "mild negligence" (Category 2), or "prompt corrective action" (Category 1) and "reasonable corrective action" (Category 2). *See* Brief of Appellant, at 12. Moreover, while an agency's response may fit neatly within one category, it could just as easily fall under several. It could involve "innocent mistakes" (Category 1), "some public interest" (Category 4), time sensitivity (Category 5), and "other mitigating factors" (Categories 1-4). *Id.*

Yousoufian's scale gives no guidance on how such complex cases would be resolved. Factors in different categories would have to be

balanced, with the principal consideration being the presence or absence of an agency's bad faith. Courts already do this in making discretionary penalty determinations. There is no need for a category system.

Yousoufian contends that by using the term "culpability" in its decision, *see Yousoufian*, 152 Wn.2d at 436, the state Supreme Court abandoned the "good faith/bad faith" dichotomy in favor of a scale similar to what he proposes above. *See* Brief of Appellant, at 13. This reads far too much into the court's language.

The court simply meant that a penalty should be based on an agency's "mental state" in responding, not the size of a plaintiff's request. This mental state is defined in terms of "the existence or absence of [an] agency's bad faith . . . ". (internal quotations omitted) *Yousoufian*, 152 Wn.2d at 435.

Yousoufian next claims the $123,780 penalty is insufficient for deterrence. Given the size of King County's budget, he argues, the penalty is insufficient to deter future misconduct by King County. Brief of Appellant, at 16.

After fully examining the facts of this case, two different superior court judges have disagreed with Yousoufian, finding that a penalty in the range of $114,000 to $123,000 is sufficient for deterrence.

Moreover, Yousoufian cites no evidence demonstrating that the penalty imposed by the trial court is an ineffective deterrent. His repeated recitation of King County's past mistakes[12] sheds no light on the adequacy of its current practices. He had every opportunity to impugn King County's current practices by engaging in discovery on remand (CP 134), but he chose not to do so. His arguments on this point are unsubstantiated and should be disregarded.

Penalties should not be based on the size of an agency's budget, and for good reason. Government agencies are not akin to a for-profit corporation like Boeing or Microsoft. They are municipal corporations that collect tax revenues and provide essential services to the public. The rationale for penalizing a for-profit corporation based on the size of its budget has no application to a non-profit, local governmental entity like King County.

Yousoufian contends this court's decision in *ACLU v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999), is no longer valid because the court failed to use the full penalty scale. Brief of Appellant, at 18. Again, Yousoufian mistakenly focuses only on the per-day penalty amount, ignoring other factors such as the district's conduct, the need for deterrence, the size of the request, and the number of penalty days. All these

[12] *See* Brief of Appellant, at 6-8.

factors must be considered in determining a just penalty. This court believed the total penalty imposed in *ACLU* was sufficient under the circumstances of that case.

The presence or absence of bad faith is key to the penalty determination, and it is somewhat of an either/or distinction. But this does not mean courts do not use the full penalty scale. Courts do not hesitate to impose higher per-day penalties where bad faith is shown. *See, e.g., BIAW v. Department of Labor & Industries,* 123 Wn. App. 656, 98 P.3d 537 (2004). But where bad faith does not exist, low-end penalties are common.

There are sound policy reasons for this. Even with good intentions and sound public disclosure systems, government agencies can make mistakes in responding to large, complex public records requests.

In the age of the internet, citizens can prepare such requests in minutes and deliver them in seconds with the click of a mouse. They often call for extensive, time consuming searches, requiring the coordination of many employees in different departments. The documents sought may have been generated over decades, and stored electronically, in archives, in record centers, in various employee files, or elsewhere.

Once responsive information is located, gathered and copied, it must all be reviewed for up to 40 potential PDA exemptions. *See* RCW

42.17.310(a) through (fff). Only then can the information be delivered to the requester.

The complexity of public disclosure does not excuse an agency's failure to timely provide public records on request. Agencies are strictly liable for their mistakes in this process. But given the unique challenges public disclosure presents, the extent of that liability must rest with the sound discretion of the trial court after considering all the circumstances. In this case, a low per day penalty was warranted given the large number of penalty days and the lack of bad faith. *See Yousoufian*, 152 Wn.2d at 449 (Chambers, J. concurring/dissenting).

Yousoufian next contends that the penalty imposed in this case undermines the enforcement mechanism of the PDA. Brief of Appellant, at 18. He claims few citizens will take action to enforce the Act's provisions when the reward is so meager.

It is difficult to see how the result of this case would discourage attorneys and citizens from pursuing PDA cases. In a case tried largely by affidavit and motion, Yousoufian's attorneys have collected nearly $300,000.00 in fees. Mr. Yousoufian has received an additional $123,000.00 in penalties.

His continual effort to portray this outcome as a grave injustice fails the test of common sense. Admittedly, King County badly mishandled a

large, complicated public disclosure request. As a result, it took far longer than it should have to produce the records he sought. But absent bad faith or tangible harm to Yousoufian or the public, there is no justification for using the PDA to make him a virtual millionaire at public expense.

This case has triggered years of adverse publicity. There are two published decisions highlighting King County's errors. The largest penalty award in the history of the PDA has been imposed. The PDA's enforcement mechanism has worked as intended. King County has paid the price for its mistakes.

Finally, Yousoufian claims that the statutory grant of discretion to the trial court in penalty determinations must be "liberally construed," and that the court in this case could not have followed this mandate given the $15 per-day penalty imposed. Brief of Appellant, at 20. King County is not aware of authority stating that an exercise of judicial discretion must be done liberally. In any event, the total penalty is sufficient to fulfill the purposes of the PDA.

5. Yousoufian's appeal is not timely and should be dismissed.

Yousoufian did not timely appeal from the trial court's Order on Remand in this case, which was filed on August 23, 2005. He waited until October 19, 2005, before filing his notice of appeal. He tried to justify this delay by claiming that the trial court did not decide his motion for attorney

fees on remand until September 22, 2005, giving him 30 days from that date to file his notice of appeal.

As King County argues in its pending Motion to Modify on this issue, Yousoufian is not correct. He was obligated to appeal within 30 days of the trial court's August 23, 2005 Order on Remand. RAP 5.2(a). The Rules of Appellate Procedure repeatedly make clear that a motion for attorney fees does not stay the time for appealing an order otherwise appealable under RAP 2.2(a). *See* RAP 2.2(a)(1); RAP 2.4(b); RAP 2.4(g). These provisions squarely refute Yousoufian's claim that his request for statutory attorney fees on remand transformed this case into one involving "multiple claims" under RAP 2.2(d). Yousoufian's appeal is not timely and should be dismissed.

6. Yousoufian is not entitled to attorney's fees on appeal.

King County asks that this appeal be dismissed, or, in the alternative, that the trial court's Order on Remand be affirmed. In either case, Yousoufian would not be the prevailing party under RCW 42.17.340(4), and therefore would not be entitled to a further award of fees and costs.

VI. CONCLUSION

For the foregoing reasons, King County asks the trial court's Order on Remand dated August 23, 2005 be affirmed.

DATED this 6th day of March, 2006.

NORM MALENG
King County Prosecuting Attorney

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

ARMEN YOUSOUFIAN, Appellant, vs. THE OFFICE OF RON SIMS, KING COUNTY EXECUTIVE; a subdivision of KING COUNTY, a municipal corporation; the KING COUNTY DEPARTMENT OF FINANCE, a subdivision of KING COUNTY, a municipal corporation; and the KING COUNTY DEPARTMENT OF STADIUM ADMINISTRATION, a subdivision of KING COUNTY, a municipal corporation, Respondents,	)	No. 57112-5-I CERTIFICATE OF SERVICE

I, Lucia Tam, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. I am a legal secretary employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.

ORIGINAL

2. On March 6, 2006, I did cause to be delivered in the manner noted below a true copy of the BRIEF OF RESPONDENT and this Certificate of Service to:

Michael G. Brannan
Law Offices of Michael G. Brannan
2033 Sixth Avenue, Suite 800
Seattle, WA 98121
[via U.S. Mail]

David J. Balint
Attorneys for Appellant
2033 Sixth Avenue, Suite 800
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Rand Jack
Brett & Daugert, PLLC
Attorneys at Law
300 North Commercial
P.O. Box 5008
Bellingham, WA 98227-5008
[via U.S. Mail]

I declare under penalty of perjury under the laws of Washington that the foregoing is true and correct.

DATED this 6th day of March, 2006 at Seattle, Washington.

NORM MALENG
King County Prosecuting Attorney

By: _____
Lucia Tam, Legal Secretary to
JOHN R. ZELDENRUST, WSBA #19797
Senior Deputy Prosecuting Attorney
Attorneys for King County